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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-330

COUNTY ASPHALT, INC., *Petitioner,*

—against—

THE LEWIS WELDING & ENGINEERING CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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* Because these Ohio Rev. Code sections are the same in all material respects to the official Uniform Commercial Code, sections the official citation will be used throughout, as was done in the courts below for the convenience of this Court.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, County Asphalt, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on June 11, 1971.

Opinions Below

The opinion of the Court of Appeals (App. A1a-16a) has not yet been reported. The opinions of the United States Court for the Southern District of New York made during and after the trial herein (App. A17a-37a) are

reported at 323 F. Supp. 1300 (S.D.N.Y. 1970). The opinion of the District Court denying respondent's motion for partial summary judgment (App. A40a-43a) is not reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 11, 1971, affirming the judgment below on behalf of respondent entered November 30, 1970, in the sum of $226,000 plus interest. A timely petition for rehearing and suggestion that the rehearing be before the Court *en banc* was denied on July 7, 1971 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Second Circuit Court of Appeals, in the absence of any binding judicial construction of Section 2-719(2) of the Uniform Commercial Code by the courts of Ohio, the jurisdiction whose law was considered applicable, failed to adopt the interpretation which the Ohio courts would have selected in light of the purposes of the Code?

2. Whether Section 2-302 of the Uniform Commercial Code is unconstitutional insofar as it requires a federal court, instead of a jury, to determine all issues common to an equitable claim of "unconscionability" and common law claims?

3. Whether the jury verdict was submitted in accordance with Rule 49(b) of the Federal Rules of Civil Procedure instead of Rule 49(a) and, if so, whether Rule 49(b) allows a general verdict to stand if it is inconsistent with the interrogatories under any reasonable standard?

Statutory Provisions Involved

The statutes involved, printed in full in Appendix B hereto, are the Seventh Amendment to the United States Constitution; Rule 49 of the Federal Rules of Civil Procedure; and Ohio Revised Code Sections 1302.15 and 1302.93.*

Statement of the Case

1. Jurisdiction of the District Court.

This action for damages in excess of $10,000 was brought in the Supreme Court of the State of New York, County of Westchester, by petitioner, a New York corporation, against respondent, an Ohio corporation doing business in New York. Respondent removed the action to the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1441 and § 1446.

2. The Pleadings.

Petitioner, County Asphalt, Inc. ("County Asphalt"), asserted claims for relief against respondent, The Lewis Welding & Engineering Corporation ("Lewis"), for damages resulting from Lewis' breaches of contracts and the warranties contained therein, which provided for the sale and construction of two automated asphalt plants capable of producing at a rate in excess of three hundred tons per hour. County Asphalt also sought to recover monies expended by it for work, labor and services performed at

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* Since these Ohio Revised Code sections are a part of the Uniform Commercial Code, which in all material respects are uniform in 49 states, petitioner will refer to them, as have the courts below, by citation to the official version of the Code, abbreviated as U.C.C. § 2-302 and U.C.C. § 2-719, respectively.

Lewis' express request under a separate, supplemental agreement (JA 6a-16a).* Lewis, after denying the material allegations of the complaint, counterclaimed for the unpaid balance of the purchase price ($385,229.25), for the alleged conversion of the plants by County Asphalt, for punitive damages, and for the rental value of an old asphalt plant traded in by County Asphalt under the contracts (JA 17a-27a). County Asphalt, in its reply, denied the material allegations of the counterclaims (JA 25a-27a).

3. The Facts.

County Asphalt is in the business of producing asphalt for its own use, for the State of New York and other governmental subdivisions, and for private customers ranging in size from large construction companies to local paving contractors (T 38-39). Lewis, the controlled subsidiary of McDowell-Wellman Engineering Company, is engaged in the manufacture of heavy industrial machinery (T 996-967).

On December 22, 1964, County Asphalt executed two contracts for the purchase and erection of asphalt plants to be located at Tarrytown and West Nyack, New York (E 2). In each of the contracts, which were set forth on its form, Lewis agreed to furnish plants, each capable of producing asphalt at a rate in excess of 300 tons per hour and each equipped with automatic controls complying with newly enacted New York State regulations. Since the asphalt production season in New York began on April 1, the parties agreed that the Tarrytown plant was to be delivered by March 1, 1965 and the West Nyack plant by

* Citations with the prefix JA are to the joint appendix in the Court of Appeals, with the prefix E to the Exhibit volume in the Court of Appeals and with the prefix T to the trial transcript.

April 1, 1965 (T 2108-2109; 1551-1552). The total purchase price was $460,000, $69,000 of which was paid immediately and payment of the balance keyed to Lewis' performance and New York State approval of the automatic controls. In addition, County Asphalt traded in two 90 ton per hour Cummer plants which were located at Tarrytown and West Nyack.

After the contracts were signed, County Asphalt dismantled the existing plants at Tarrytown to provide the necessary space on its property to erect the new plant (T 2121). County Asphalt was, therefore, entirely dependent on Lewis' timely performance to begin asphalt production on April 1, 1965 at Tarrytown for several major New York State road construction contracts in the area (T 1551-1552).

On March 1, 1965, Lewis' representative arrived at Tarrytown to make arrangements for the erection of the plants (T 459-463). Since Lewis could not obtain union labor in the area to perform its obligation to erect the plants without entering into a collective bargaining agreement with the local unions, Lewis requested that County Asphalt carry on its payroll the labor needed to erect the plant and "backcharge" Lewis for its costs (T 72-73; 987-988). County Asphalt agreed to this "backcharge agreement," which was common in the construction trade, in order to allow Lewis to complete erection by April 1, 1965.

On March 15, 1965, Lewis' supervisors arrived and began work (T 450; T 1981-1985). From the beginning, Lewis' attempt to erect the Tarrytown plant met with countless problems. Major component parts were delivered late preventing orderly construction of the plant. Even when the parts arrived, they did not fit together properly and had to be modified at the site (T 2019-2023). April 22, 1965, three weeks after the asphalt season began

in New York, was the first day Lewis believed the plant to be operational, although no automatic controls had yet been installed. On that day, the legs of the 200 ton bins which supplied the plant with stone for the asphalt mix began to deform and one buckled before they were filled for the first time. (T 2034-2037). From that auspicious start, other parts of this plant, too numerous to detail here but all proven at trial from the mouths of Lewis' employees, failed causing plant breakdowns which drove County Asphalt's customers, including large companies holding New York State highway construction contracts, to purchase asphalt from other producers. The automatic controls at Tarrytown were not installed until the end of June 1965, and soon thereafter they short-circuited, causing a fire in the control room (T 1724-1726).

At West Nyack, similar problems occurred. This plant, which the contract obligated Lewis to deliver by April 1, 1965, was not erected until the end of August (T 1028-1029) and its automatic controls were not approved by New York State until mid-September 1965. County Asphalt lost profits from the delays and breakdowns in both plants. Although it had hoped to double its production capacity by the purchase of these two 300 ton per hours plants (T 637-38), County Asphalt discovered that each plant could produce only 180 to 210 tons per hour, depending on the type of asphalt being mixed, even during those periods when all the component parts were functioning (T 2147). This inherent design defect gave County Asphalt only a slight increase in capacity from what it had been able to obtain in 1964 from its old plants.

This action was commenced when Lewis demanded that County Asphalt pay the entire purchase price outstanding before it repaired any further defects as the contract required (E 30). Lewis further denied any obligation to

repay County Asphalt for the invoices submitted to Lewis totalling over $200,000.00, under the labor "backcharge agreement" (E 30).

4. Prior Proceedings.

In 1968 Lewis moved for partial summary judgment to dismiss County Asphalt's money damage claims for breach of contract. Lewis contended that the following clause in each of the sales contracts defeated County Asphalt's claim:

> "It is also provided that the remedy herein provided the purchaser shall be exclusive for any breach . . . and that the Company [Lewis] shall in no event have any liability for . . . consequential damages. . . .
>
> "The Company will repair . . . and replace any part or parts of the equipment which upon examination are determined to be defective or non-conforming under the Company's Warranty . . ." (E 17)

County Asphalt submitted affidavits from officers of large construction companies who recounted how the numerous breakdowns and slowdowns in the plants caused them to turn to other producers whose plant sites were not located as advantageously as County Asphalt's. They also stated how much asphalt they had planned to purchase from County Asphalt, absent the breakdowns. County Asphalt's also demonstrated that it lost profits in excess of $450,000.

The District Court found that, although the law was so murky that its decision was subject to re-examination, these contract clauses could be overcome if the repair and replacement remedy "failed of its essential purpose" under U.C.C. § 2-719(2) and if the exclusion of consequen-

tial damages were unconscionable under U.C.C. § 2-719(3) (App. A41a). Since those issues raised questions of fact which substantially overlapped County Asphalt's other claims, the motion was denied (App. A43a).

The trial was commenced on October 5, 1970 in the United States District Court for the Southern District of New York before a jury. Before the jury was empaneled, Lewis moved for a preliminary hearing before the court on the issue of the unconscionability of the exclusion of consequential damages (JA 37a). After County Asphalt stated that the jury must determine all facts on which such a finding would be based, the court denied the motion stating that issue would be determined "at the appropriate time" (JA 39a). However, before County Asphalt completed its case in chief, the court handed down its ruling on that. It held that the validity of the clause excluding consequential damages can only be determined under the standard of unconscionability set by U.C.C. § 2-719(3) and § 2-302 and, after finding such facts as Lewis substantially performed the contracts and acted in good faith, determined that County Asphalt was not entitled to prove its consequential damages (App. A33a-38a).

On October 26, 1970, the court said that it did not intend to use a general verdict procedure. Instead, it planned "to present to the jury certain questions in the nature of a special verdict" (JA 112a), observing that it had "pretty much made up [its] mind as to what questions I will present to them for their consideration so that we can narrow the issues that they will try to decide" (JA 112a). When asked whether the procedure contemplated was a general verdict with interrogatories or a special verdict, the court said: "[w]ell, it is tantamount to a special verdict which would result in the direction of a general verdict in the event that the questions are answered in such a manner as they suggest would be

the proper procedure at that time" (JA 113a). The parties were then assured that they would not waive anything by failing to submit an issue, a specific sanction under the special verdict procedure of Fed. R. Civ. P. 49(a). The court concluded the discussion by saying that "[t]his is a matter that will be presented to the jury for the guidance of the Court and for their guidance." (JA 113a). While the court mentioned a general verdict with interrogatories procedure when it handed out the verdict form the following day. (T 2628), it also continued to speak of a special verdict (JA 160a).

On October 29, 1970, both sides made their closing arguments to the jury (T 2844-2962) referring to Lewis' claim for the purchase price, in accordance with their stipulation, as $385,229.25 (JA 149a) or $385,000 (T 2893, 2895, 2908, 2957).

After deliberating for six hours, the jury returned its verdict (reprinted at App. A27a-33a). The jury found that, although Lewis had substantially performed the contracts of December 22, 1964 (Spec. Interrog. 1, App. A28a),* it had not repaired or replaced every defective or non-conforming part of which it was made aware and given the opportunity to remedy (Spec. Interrog. 4a, App. A30a); that there was a balance due to Lewis from the total purchase price of the Tarrytown and West Nyack plants in the amount of $226,000 (Spec. Interrog. 2 and 2a, App. A28a); that there was a supplemental agreement between the parties wherein County Asphalt agreed to supply labor, materials and equipment as needed by Lewis in the erection of the plant with Lewis agreeing to repay County Asphalt on being "backcharged" (Spec. In-

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* Petitioner here refers to the "Special Interrogatories" submitted by the court to the jury, abbreviated as Spec. Interrog.

terrog. 3, App. A28a); and that, the reasonable amount that County Asphalt should have backcharged Lewis for monies expended by it for employees, materials and equipment was $160,000 (Spec. Interrog. 3a, App. A29a). The jury also found that County Asphalt had operated the plants in a proper manner (Spec. Interrog. 6; App. A31a); that Lewis was not negligent (Spec. Interrog. 5, App. A30a); that County Asphalt was not liable for damages for converting the plants (Spec. Interrog. 7 and 7a, App. A32a); and that, County Asphalt was not liable for the reasonable rental value of the old West Nyack plant (Spec. Interrog. 8, App. A33a). On page 1 of the verdict form, which bore the title "General Verdicts with Special Interrogatories" and contained two questions, the jury answered "$226,000" in response to a question asking whether County Asphalt was indebted to Lewis "for any amount not offset by the total of backcharges and damages" (App. A27a).

After the jury verdict was read, the court said: "[t]he jury has signed the special verdict" and also ruled that "the answers to the special interrogatories are consistent with answers to the general verdict" (JA 160a). The court then remarked that "the difference is $66,000." Although this latter statement was not recorded in the transcript by the court reporter, the court, in hearing motions the following week with respect to the verdict and post verdict motions, did not deny that it made this statement but only said that it was "mistaken" if it had done so (T 3025).

On November 9, 1970, the court entered judgment for Lewis in the sum of $226,000 (JA 177a). Thereafter, County Asphalt moved, alternatively and without conceding that the jury had returned a general verdict in Lewis' favor for $226,000, to amend the "general verdict" to reduce it from $226,000 to $66,000 in Lewis' favor and, in

addition, for judgment in County Asphalt's favor in the amount of $18,229.25 or, alternatively, $66,000 notwithstanding the "general verdict" of $226,000. County Asphalt also moved for a new trial or an inquest on a number of grounds, including the ground that a specific finding by the jury had been disregarded by the entry of a general verdict for $226,000 and, in addition, that the entry of a general verdict in the amount of $226,000 was erroneous and incorrect on the basis of the facts stipulated by the parties and the court's instructions to the jury. Judgment was initially entered in the amount of $226,000 and, subsequently, upon Lewis' motion, the judgment was amended to include pre-judgment interest.

County Asphalt made a timely appeal to the United States Court of Appeals for the Second Circuit on several grounds, including those asserted in this petition. On June 11, 1971, the Court of Appeals affirmed the judgment (App. A1a-16a). A timely petition for rehearing was denied by the Court of Appeals on July 7, 1971 (App. A17a).

Reasons For Granting The Writ

POINT I

In affirming the District Court's ruling that the contractual exclusion of consequential damages was valid, the Court of Appeals failed to apply Ohio law correctly.

In refusing to invalidate the clause in both contracts excluding County Asphalt's recovery of consequential damages, the District Court and the Court of Appeals held that the Uniform Commercial Code of Ohio determined that parties' rights under the contracts (App. A

19a; 37a). After making this determination, the Court of Appeals then failed to apply the correct standard for ascertaining what the law of Ohio was, absent any interpretation by the Ohio courts of the relevant Uniform Commercial Code sections.

Under the Uniform Commercial Code of Ohio, the contractual limitations of County Asphalt's remedy to repair and replacement of defective parts and the exclusion of liability for consequential damages were permitted. U.C.C. § 2-719. However, the same Code section which allows limited remedies also specifies the circumstances under which they will not be enforced. U.C.C. § 2-719(2) states:

> "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act."

County Asphalt has consistently argued throughout this litigation that, upon proving that the exclusive remedy of repair and replacement fails of its essential purpose, not only would that contractual limitation be void but the exclusion of consequential damages clause would simultaneously fall. Many reasons were advanced by County Asphalt in support of this interpretation.

1. Section 2-719(2) states that when the exclusive remedy fails, "remedy may be had as provided in this Act." (The Ohio provision, Page's Ohio Rev. Code 1302.93, expressly sets forth each article of the Code instead of referring to the "Act" in general). Since the Code provides for recovery of consequential damages in U.C.C. § 2-715 (Ohio Rev. Code 1302.89), proof of the failure of the limited remedy unquestionably allowed County Asphalt to recover its lost profits.

2. Lewis not only breached its duties under the exclusive remedy clause but it expressly refused to perform

the limited remedy, thereby repudiating all the exculpatory clauses in the contracts.

3. By failing to substantially perform the agreement, which deprived County Asphalt of the essence of the bargain, all exculpatory clauses limiting Lewis' liability were ineffective.

4. By limiting County Asphalt to a non-monetary remedy, repair and replacement of defective parts, as is permissible under the Code, the exclusion of consequential damages, a monetary remedy, was redundant and should therefore fall simultaneously with the exclusive remedy.

The District Court, both in denying Lewis' summary judgment motion and at trial, rejected County Asphalt's arguments, holding that the validity of the consequential damage clause was governed only by U.C.C. § 2-719(3). (App. A37a; 41a). However, no precedent at the time of these rulings existed.

Between the entry of final judgment in the District Court and the argument before the Court of Appeals, two decisions directly in point were reported on the interpretation of U.C.C. § 2-719(2) in relation to the exclusion of consequential damages, both of which accepted County Asphalt's position. *Jones & McKnight Corp.* v. *Birdsboro Corp.*, 320 F. Supp. 39 (N.D. Ill. 1970) and *Adams* v. *J. I. Case Company*, 125 Ill App 2d 388, 261 N.E. 2d 1 (1970).

In *Adams*, a purchaser of a crawler loader tractor sought direct and consequential damages from the seller in the face of a warranty which not only provided for an exclusive remedy of repair and replacement but also stated "[i]n no event shall Dealer or Company be liable for consequential damage of any kind or nature . . .", both of which are clauses in issue in the case at bar. 125 Ill App 2d at 388, 261 N.E. 2d at 6. The Illinois court stated the issue which is that of the case at bar:

> "[M]ay consequential damages be sought despite the fact that the written warranty . . . limits liability to that of repair and replacement of defective parts and negates liability for consequential damages?" 125 Ill App 2d at 400, 261 N.E.2d at 6.

After stating that the conscionability of the clauses was not at issue, the court went on to hold that, since dilatory performance of the exclusive remedy by the seller constitutes repudiation of the warranty, the limited remedy and the exclusion of consequential damages simultaneously failed of their exclusive purpose. The buyer was allowed to recover consequential damages. Shortly thereafter, the United States District Court for the Northern District of Illinois expressly adopted the *Adams* holding in *Jones & McKnight Corp.*, although it was applying Pennsylvania law. That court, faced with the same contractual clauses as the case at bar and a claim for lost profits, found *Adams* the only case in point and the "decision which reason dictates." 320 F. Supp. at 43. The purchaser was allowed to pursue its claim for lost profits.

The Court of Appeals for the Second Circuit, after these cases were brought to its attention, did not evince any concern that these recent decisions had so clarified the law of Ohio, which the Court declared applicable, that the District Court's ruling was an erroneous application of Ohio law. The Court of Appeals, without discussion, approved the ruling of the District Court. (App. A14a).

Under the doctrine of *Erie RR.* v. *Tompkins*, 304 U.S. 64 (1938), the federal courts under their diversity jurisdiction must apply the applicable state substantive law. If no interpertation of a state statute has yet been made by the courts of that state, "'estimates' are necessarily often all that federal courts can make in ascertaining what the

state court would rule to be its law." *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 209 (1956) (Frankfurter, J., concurring).

County Asphalt respectfully submits that the Court of Appeals' estimate of the Ohio court's potential interpertation of the relationship of U.C.C. § 2-719(2) to clauses excluding consequential damages had no rational basis in light of the *Adams* and the *Jones & McKnight* decisions, which are the only cases directly in point on the law and facts and expressly uphold County Asphalt's position. In doing so, the Court decided the issue in "conflict with applicable state . . . law." Sup. Ct. R. 19(b).

As its title clearly implies, the Uniform Commercial Code was meant to be interpreted uniformly "to simplify, clarify and modernize the law governing commercial transactions" U.C.C. § 1-102(2). However, "if the Uniform Commercial Code is to be uniform, it is important that it be uniformly interpreted." *In re Glennwood Packing*, 4 U.C.C. Rep. 844, 886 (S.D.Iowa 1967) (not officially reported). To that end, the best source for a federal court to examine when the state jurisdiction has not interpreted a Code section is the decisions of other jurisdictions on the point in question. *Val Decker Packing Co.* v. *Corn Product Sales, Inc.*, 411 F.2d 850, 852 (6th Cir. 1969); *Silver* v. *Gulf City Body & Trailer Works*, 432 F.2d 992, 993 (5th Cir. 1970).

The *Silver* court stated the rationale for looking first and foremost to other jurisdictions for "estimating" a state court's approach to an uninterpreted Code section:

> "There are no interpretative decisions from that State's Courts. This circumstance, when taken with the law's expressed desire for national uniformity in commercial law, propels us to an examination

> of the decisional law of the other Uniform Commercial Code jurisdictions." 432 F.2d at 993.

While there are no Ohio decisions reflecting the route of analysis which the Ohio courts would take on the issue at bar, the Court of Appeals for the Sixth Circuit's approach to other Ohio Code sections which that State had not interpreted has given a road map. In *Val Decker Packing Co.*, the Court looked at Pennsylvania law after finding that:

> "Since there are no Ohio decisions in point, we *must* look to other jurisdictions for authority and guidance." 411 F.2d at 852 (emphasis added).

As that opinion was written by a member of the Ohio bar, Judge Weick, sitting in the circuit which includes Ohio, this Court should give it "special weight" as stating the approach Ohio courts would take in interpreting the Code. *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 204 (1956); *McGregor* v. *State Mutual Life Assur. Co.*, 315 U.S. 280, 281 (1942) (per curiam).

On the basis of *Val Decker* and the cases cited above, it is clear that an Ohio court presented with this issue would turn to the law of other jurisdictions. Upon doing so, the only decision to be found by a sister state court directly on point is *Adams*. That case is the binding law of Illinois. It is not an "estimate" of that jurisdiction's approach. It was approved and followed in *Jones & McKnight* as a source of Pennsylvania law. There is no reasonable basis for saying that the courts of Ohio would not adopt the rationale of these decisions as a clear statement of the correct interpretation of the Code. For the Court of Appeals to reject the *Adams* and *Jones & McKnight* cases outright as a source of Ohio law was entirely unreasonable in light of *Val Decker Packing Co.*

County Asphalt submits that as *Adams* states most reasonably the law of Ohio on the interpretation of U.C.C. § 2-719(2) in relation to clauses excluding consequential damages, the Circuit Court, by affirming the District Court's opinion which is in direct conflict with *Adams*, failed to decide the case in accordance with the applicable state law. County Asphalt, under the correct law of Ohio, should recover its lost profits.

County Asphalt further submits that resolution of this controversy will provide the lower federal courts with a necessary guide to interpreting the Codes of jurisdictions which have not had an opportunity to rule on questions raised in federal court. The uniformity of the Code throughout every state except Louisiana and the wide range of actual and potential litigation under uninterpreted Code sections necessitates a clear answer to this question.

POINT II

The Court of Appeals' opinion permitting the District Court to find facts common to equitable and common law claims is in direct conflict with the Seventh Amendment and the decisions of this Court.

A. This Court's Interpretation of the Seventh Amendment.

Under the principles established by this Court in *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959), and reasserted in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), and *Ross v. Bernhard*, 396 U.S. 531 (1970), a party in a federal court action, upon timely demand, has a Seventh Amendment right to a final jury determination of all issues common to equitable and legal claims for relief. The rationale of this basic constitutional principle is that

a trial court, by deciding equitable claims before legal claims are submitted to the jury, collaterally estops the jury from deciding any issues of fact common to both the legal and equitable claims. "Since the right to a jury trial is a constitutional one, however, while no similar requirement protects trials by courts," 359 U.S. 510, such collateral estoppel of the jury is impermissible. Instead, this Court has held in the above cases that, when such common issues of fact appear in a federal court action, the jury must finally determine them in connection with the legal claims before the court can determine the equitable claims. The jury's findings in connection with the common issues will therefore be binding on the court's determination of the equitable claims.

The District Court below violated this clear constitutional requirement when it decided issues of fact common to County Asphalt's equitable claim of "unconscionability" under U.C.C. § 2-302 and its legal breach of contract claims before submitting them to the jury. The Court of Appeals, in affirming that finding on the basis that "unconscionability" as an equitable remedy is not a jury issue under the Seventh Amendment (App. A16a), completely ignored this Court's mandate that issues of fact common to equitable and legal relief must be tried by the jury.

The Ohio Code, like that of every other Code jurisdiction, requires that the court determine the issue of "unconscionability" as a matter of law after hearing "evidence as to [the contract's] commercial setting, purpose and effect to aid the court in making the determination." U.C.C. § 2-302(2). Petitioner respectfully submits that a federal court cannot determine any fact bearing on the "unconscionability" of a contractual provision which is common to a legal claim, such as breach of contract, without contravening the supreme command of the Seventh Amend-

ment and the principles of *Beacon Theaters, Dairy Queen* and *Ross*.

In *Byrd v. Blue Ridge Electrical Coop.*, 356 U.S. 525 (1962), this Court held that state law requirements, such as that of U.C.C. § 2-302, that issues be tried by the court, must give way to the Seventh Amendment right to trial by jury where the two conflict in a diversity suit, stating:

> "We do not think that the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome." 356 U.S. at 590

See also *Simler v. Conner*, 372 U.S. 221 (1963), and *Ballard v. Moore-McCormack Lines, Inc.*, 285 F. Supp. 290, 297 (S.D.N.Y. 1968). Thus there can be no doubt that the principles of *Beacon Theaters* and its progeny must be applied to the application of U.C.C. § 2-302 in diversity suits.

B. The Decisions Below Ignored This Court's Interpretation Of The Seventh Amendment.

Before going further, petitioner must make clear that it need not, and does not go so far as to assert that, as the Court of Appeals believed, the ultimate determination of "unconscionability" must be submitted to the jury. County Asphalt submits, however, that the District Court and Court of Appeals failed to apply the standard enunciated in *Beacon Theatres* to the many issues of fact common to County Asphalt's legal claims for relief and the equitable issue of "unconscionability."

Petitioner's amended complaint set forth causes of action for breach of the two sales contracts, and the warranties contained therein, and for negligent performance of the contracts, seeking both general and consequential money damages. It is beyond question that County Asphalt, having made a timely demand, had a right to a jury determination of these issues under the Seventh Amendment. However, to overcome Lewis' defense that the contract limited County Asphalt's remedy for any breach to repair and replacement of defective parts, County Asphalt offered proof that that remedy failed of its essential purpose under U.C.C. § 2-719(2) and expressly asked the court to so charge the jury (JA 28a), which it refused to do.

For the issues of breach of contract and failure of the exclusive remedy, County Asphalt, at trial, presented the same basic evidence. It proved, mainly from the mouths of Lewis' former employees, that the plants contained massive defects which were the results of Lewis' faulty design, fabrication and erection of the plants. This proof showed not only that Lewis breached the contracts, but also, on the U.C.C. § 2-719(2) issue, that the parties could not have intended the exclusive remedy to apply to the major structural changes necessary to repair the defects. County Asphalt also proved that Lewis, by failing to repair the defects in a reasonable time and refusing to repair the majority at all, breached the exclusive remedy, thereby causing it to fail of its essential purpose.

Before County Asphalt even finished presenting its evidence on the above issues, the trial court ruled, as discussed in Point I, that County Asphalt could recover only general damages if it proved the exclusive remedy failed of its essential purpose, since the exclusion of consequen-

tial damages was "conscionable" under U.C.C. § 2-719(3) and 2-302, based on the following findings of fact:

> (1) Lewis acted in good faith in its performance of the contracts (App. A34a).
>
> (2) Lewis substantially performed the contracts (App. A35a).
>
> (3) No inequality of bargaining power or unfair surprise existed (App. A36a).
>
> (4) County Asphalt had an adequate remedy since it would recover general money damages upon proof that the exclusive remedy failed of its essential purpose (App. A36a-37a).

These findings of fact invaded the province of the jury in violation of the teaching of *Beacon Theaters* and its progeny.

First, the District Court assumed that the jury, upon proof of any breach alleged, would award County Asphalt damages thereby making the exclusion of consequential damages "conscionable." Under the District Court's and Court of Appeals' interpretation of the "Interrogatories", the jury did not award one penny of damages to County Asphalt although it proved Lewis breached the repair and replacement remedy. (Spec. Interrog. 4(a), App. A10a). The District Court stated:

> "If *any* of these breaches are proven to have occurred, the circumstances of the parties then and now will render the exclusive remedy provided *wholly inadequate*" (emphasis added) (App. A 36a).

It went on to add that enforcement of the non-monetary remedy of repair and replacement "in the face of *any* of the breaches asserted herein would be to create an *uncon-*

scionable result" (emphasis added) (App. A36a-37a). From these two passages, it is clear that the District Court based its finding of conscionability upon an assumed award by the jury of damages for *any* breach, which assumption in fact was not borne out. By making that assumption, the District Court, in effect, found breach of contract damages before submitting that clearly legal issue to the jury. The Seventh Amendment forbids such a practice.

The second finding of fact which the Court made in determining conscionability, that of substantial performance, was so obviously common to the contract issues that the court submitted that very issue to the jury in its first "Interrogatory." The court was rescued from the mire of collateral estoppel when the jury concurred in the court's prior determination that Lewis substantially performed the contracts. However, by deciding the issue of substantial performance not only prior to submitting it to the jury but before petitioner completed its case in chief, the court severely prejudiced County Asphalt's case. The court's charge on substantial performance (JA 147a), to which County Asphalt objected but which the Court of Appeals refused to discuss, defined the issue so that it would be impossible for the jury to find differently from the court's prior determination. Instead of properly explaining to the jury that, if the plants could not be conformed to the contract specifications without materially altering their structure, Lewis did not substantialy perform, the court's vague charge left the impression that Lewis substantially performed if the plants produced any asphalt.* Because of this charge, it is clear that the

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* Well aware that its requested instruction on the issue of substantial performance had been denied and, of course, aware of the court's own ruling on the issue, County Asphalt placed its main reliance in closing argument on the breach of its limited remedy.

District Court felt that it had already decided the issue and the jury must follow its decision. In short, the District Court collaterally estopped the jury on the issue of substantial performance, an issue obviously common to both equitable and legal claims, in direct violation of *Beacon Theaters*.

Because of the lower courts failure to follow the dictates of the Seventh Amendment, this Court should grant the petition to reverse their decisions.

C. The Decision Below Raises Important and Recurring Questions of the Right to Jury Trial in Diversity Actions.

County Asphalt respectfuly submits that this Court should resolve the conflict between the Seventh Amendment right to jury trial as defined in *Beacon Theaters, Dairy Queen* and *Ross* and the requirement of U.C.C. § 2-302 that the court decide the subsidiary facts relating to unconscionability as a matter of law. The Code is in effect in every state but Louisiana. Section 2-302 applies both to commercial and consumer sales of goods, and is asserted more and more frequently in litigation not only in state courts and in the District of Columbia, but also in federal courts under diversity jurisdiction. Since, in almost every imaginable case, there will be issues of fact common to unconscionability and contract claims, this Court, by granting this petition, will clarify both to potential litigants and the lower courts the extent of Seventh Amendment rights.

POINT III

The Court of Appeals' interpretation of the jury's verdict presents the following important questions under Rule 49 of the Federal Rules of Civil Procedure:

A. Whether the Court of Appeals applied the proper standard for determining inconsistency between the general verdict and interrogatories under Rule 49(b), and

B. Whether the verdict was a Rule 49(a) special verdict instead of a Rule 49(b) general verdict?

Towards the conclusion of the trial and, after announcing that it planned to seek special verdicts from the jury, the District Court submitted the case to the jury on the verdict form reprinted at pages 27a-33a of Appendix A. Although the District Court and Court of Appeals later denominated this verdict form as a General Verdict accompanied by Answer to Interrogatories, pursuant to Rule 49(b) of the Federal Rules of Civil Procedure (App. A7a; 21a), the verdict form was labeled "General Verdicts With Special Interrogatories" and divided into "Questions in the nature of a general verdict" and "Special Interrogatories" (App. A27a-28a). In answering these "Special Interrogatories" the jury found, among other things, the following:

1. Lewis substantially performed the contracts (Spec. Interrog. No. 1; App. A28a).
2. Lewis breached the limited remedy of repair and replacement (Spec. Interrog. No. 4a; App. A30a).
3. County Asphalt owed Lewis $226,000 from the stipulated $385,229.25 balance of the contract price (Spec. Interrog. No. 2a; App. A28a).

4. Lewis owed County Asphalt $160,000.00 under the separate backcharge arrangement (Spec. Interrog. No. 3a; App. A29a).

Although these "Interrogatories" clearly show, as the trial judge noted after reading the verdict (T 3025), that County Asphalt owed Lewis a total of $66,000 (the difference between the amounts due under the contract and the amounts due under the backcharge agreement), the District Court decided, after a week's deliberation, that judgment should be entered for Lewis in the sum of $226,000 based entirely upon the jury's answer to the first question in the nature of a general verdict (JA 177a).

County Asphalt then moved to amend the judgment or for a new trial on the following alternative grounds, among others: First, if a Rule 49(b) procedure was followed, judgment must be entered in accordance with the "Interrogatories" as required by Rule 49(b), since they were consistent with the "general verdict" and secondly, that the "Special Interrogatories" were actually special verdicts pursuant to Rule 49(a). In either event, County Asphalt contended that, as the trial judge had immediately observed after hearing the verdict of the jury, it was entitled to the entry of a judgment in Lewis' favor for only $66,000. County Asphalt's motion was nonetheless denied (App. A27a).

After holding that the District Court had submitted a verdict under Rule 49(b) (App. A7a), the Court of Appeals, despite the manifest impossibility of the task, found that the interrogatories were consistent with the so-called general verdict in the belief that under *Julien J. Studley v. Gulf Oil Corp.*, 407 F.2d 521, 526-527 (2d Cir. 1969), it

> "must struggle to avoid the finding of inconsistency and 'attempt to reconcile . . . . by exegesis, if neces-

> sary', the specific responses with the jury's overall judgment as to who should win and who should lose." (cases omitted) (App. A8a).

County Asphalt contends that this approach to the problem of inconsistency between interrogatories and a general verdict contradicts the purpose and plain language of Rule 49(b), which undeniably requires that the jury's answers to interrogatories be preferred to a general verdict as the true indicia of its intent. County Asphalt, of course, still contends that the answers to these "Interrogatories" are, in fact, special verdicts pursuant to Rule 49(a) of the Federal Rules of Civil Procedure. Whatever approach is taken, the result is the same: judgment must be entered in Lewis' favor for only $66,000.

1. *Studley* Is Not A Proper Standard of Inconsistency

Rule 49(b) of the Federal Rules of Civil Procedure states that:

> "When the answers (to interrogatories) are consistent with each other, but one or more is inconsistent with the general verdict, judgment may be entered ... . in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration . . . or may order a new trial."

By its very language, the rule requires entry of judgment based on the interrogatories instead of the general verdict in the event the two are inconsistent. The basis for this preference is twofold. First, the answer to a specific interrogatory is a more accurate measure of the jury's actual findings than the general verdict since the ultimate finding may become confused in combining the answers to the specific questions. Second, as stated in *Elliot* v.

Watkins Trucking Co., 406 F.2d 90, 92 (7th Cir. 1969), the general verdict may represent an erroneous application of law to the specific findings in the interrogatories, which can be cured by the court:

> "when a jury has specially found facts which compel a certain result as a matter of law and has, by general verdict, reached a result which the found facts do not permit, it may reasonably be assumed that the jury erred in the legal reasoning by which it proceeded from the specially found facts to the general verdict."

Where, as in the case at bar, there is no general verdict (as discussed at pp. 29-30 *infra*), there is even greater reason to prefer the specific responses of the jury.

The basis of the *Studley* standard for determining inconsistency between the interrogatories and the general verdict appears to be that the court, by failing to resolve any potential conflict in favor of the general verdict even by "exegesis", would run afoul of the Seventh Amendment requirement that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States . . .". See *Julien J. Studley* v. *Gulf Oil Corp.*, 407 F.2d at 526, 527. An approach honoring specific jury findings is, of course, more faithful to the Seventh Amendment. By entering judgment on the interrogatories under Rule 49(b), a court is following the true findings of the jury, thus disregarding any confusion the jury may have had in combining the specific factors into a general verdict or in applying the law to the specific findings. Since the *Studley* standard in fact rejects the jury's true finding in violation of the Seventh Amendment and directly conflicts with the language and rationale of rule 49(b), it is incorrect. None of the opinions of this Court cited in

Studley support the "by exegesis" standard. These decisions do not reach the question of the standard for consistency between Rule 49(b) general verdicts and interrogatories. Instead, they involve special verdicts or state court procedures.

This Court should require that the procedure established by Rule 49(b) should be followed faithfully by the lower courts. In doing so this Court protects the Seventh Amendment rights of the parties to a far greater degree than does the "by exegesis" standard of *Studley*.

2. The "Special Interrogatories" Are Rule 49(a) Special Verdicts

The special verdict procedure contemplated by Rule 49(a) requires a specific jury decision on every issue of ultimate fact, *A. M. Webb & Co.* v. *Robert P. Miller Co.*, 78 F.Supp. 24 (E.D. Pa. 1948), *rev'd on other grounds*, 176 F.2d 678 (3d Cir. 1949), and that is precisely what the District Court sought in the case at bar. Only questions of ultimate fact may be submitted to a jury for determination by special verdict. *Battery Workers' Union* v. *Electric Storage Battery Co.*, 78 F.Supp. 947 (E.D. Pa. 1948), and "[n]umerous evidentiary issues should not be submitted where they merely restate, elaborate, or confirm the jury's decision on controlling issues." *Truitt* v. *Travelers Ins. Co.*, 175 F.Supp. 67, 72 (S.D. Tex. 1959), *aff'd*, 280 F.2d 784 (5th Cir. 1960). The functional limitation of Rule 49(a) special verdicts was expressed in *A. M. Webb*:

> "Federal Rules of Civil Procedure, rule 49(a), 28 U.S.C.A. following section 723c, prescribes that a special verdict would be in the form of a written finding 'upon each issue of fact' . . . 'A special issue or special interrogatory should relate to, and call

> for, only the determination of some ultimate fact involved in the case, and essential to the right of action or matter of defense * * *,' 64 C.J., Page 1132, and an interrogatory is improper and may be refused submission where it relates to or calls for a merely evidentiary fact." 78 F.Supp. at 27.

In contrast, Rule 49(b) requires that interrogatories accompanying a general verdict relate solely to questions of pure fact. *Feldman* v. *Connecticut Mut. Life Ins. Co.*, 142 F.2d 628, 634 (8th Cir. 1944). Having elected to use Rule 49, the nature of the questions submitted by the court to the jury must conform to the unique requirements of the applicable subdivision, *Feldman v. Connecticut Mut. Life Ins. Co., supra; A. M. Webb & Co.* v. *Robert P. Miller Co., supra.*

In the case at bar, the "Special Interrogatories" called for verdicts on each ultimate issue in dispute, such as substantial performance (Spec. Interrog. No. 1), the existence of an oral agreement (Spec. Interrog. No. 3), negligence (Spec. Interrog. No. 5), conversion (Spec. Interrog. No. 7), and no questions of an evidentiary nature were submitted. The so-called "Special Interrogatories" can only be considered Rule 49(a) special verdicts.

Furthermore, it is clear from the face of the verdict from that the two "Questions in the nature of a general verdict" are not a general verdict. While it is not defined in the Federal Rules, a general verdict is a pronouncement at the same time on the facts and law in favor of either plaintiff or defendant. *Glenn* v. *Sumner*, 132 U.S. 152, 156 (1889); *Schofield* v. *Baker*, 242 F. 657, 658 (W.D. Wash. 1917), citing 4 Blackstone's Commentaries 461; CPLR §4111(a) (McKinney's Consol. Laws of New York 1963).

Ultimate questions in the nature of a general verdict such as the District Court used are not a general verdict in form and, more importantly, the jury was never informed that its answers to these questions took precedence over the Special Interrogatories or that they were to constitute the jury's overall resolution of the controversy (JA 149a-153a). Their designation as "Questions in the nature of a general verdict" makes it clear that the District Court did not intend these two questions to dispose of the case, and the court's numerous references to the "Special Verdict" procedure reinforces this fact (JA 112a; 113a, 160a; T 2628).

It is obvious from the fact of the verdict form that the "Questions in the nature of a general verdict" do not cover all issues submitted to the jury. The second question in the "general verdict" section asks whether Lewis is indebted to County Asphalt for any amount County Asphalt "expended over and above the unpaid balance of the purchase price", which unpaid balance was stipulated at $385,229.25. That question dealing with amounts expended by County Asphalt does not include the issues contained in "Special Interrogatories" No. 1 and No. 2 which deal, in part, with damages for defects which County Asphalt did not repair because of their great cost, such as the plant's failure to produce 300 tons per hour, and therefore could not have "expended" anything. Also, the issue of Lewis' negligence is not subsumed under items on which County Asphalt "expended" money. Thus it is clear that since the verdict form contained no "general verdict" and the "special interrogatories" resolved every ultimate issue in the case, the District Court should have followed the Rule 49(a) special verdict procedure and found the general verdict to be $66,000 in favor of Lewis instead of $226,000.

3. The "Special Interrogatories" Award Lewis $66,000, Not $226,000

The only consistent view of the "Special Interrogatories" is that they award $66,000 in damages. "Special Interrogatory" No. 4(a) states that Lewis breached the repair and replacement remedy contained in the contracts. "Special Interrogatory" No. 2 states that the balance due Lewis on the purchase price of contracts is $226,000. Since the balance due under the contracts was $385,229.25, "Special Interrogatory" No. 2 can only represent the balance due Lewis after deduction of County Asphalt's damages for Lewis' breach of the repair and replacement remedy. Both these "interrogatories" relate to the two sales contracts.

From that $226,000 due Lewis under the sales contract must be deducted the $160,000 awarded County Asphalt in "Interrogatory" 3(c) for its expenses under the "back-charge agreement". That issue was treated separately from the sales contract issued by the parties in their openings and closings and by the judge in his charge and verdict form (T 2882-2886; 2918-2922; 2981; JA 179a). This gives Lewis a total award of $66,000. County Asphalt can, if the Court desires, support this interpretation of verdict from the record as well as the face of the form.

Therefore, it is clear that under the proper standard for determining consistency under Rule 49(b), as shown in Part 2 above, the general verdict of $226,000 cannot stand in the face of the "Special Interrogatories" award to Lewis of only $66,000. It is also clear that under the Rule 49(a) Special Verdict procedure actually followed by the District Court, a judgment for Lewis in the sum of $66,000 is the only possible result.

4. These Issues Present Important And Recurring Questions Under The Federal Rules of Civil Procedure

The Rule 49 procedures were introduced to assist the jury in determining more accurately cases involving many complex issues. See Wright, *The Use of Special Verdicts in Federal Court,* 38 F.R.D. 199, 201. County Asphalt respectfully submits that by granting this petition, this Court can insure that the lower federal courts will properly apply Rule 49 in the future and thus prevent the very confusion that the Rule was meant to avoid.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A—Opinions Below

IN THE
UNITED STATES COURT OF APPEALS
For the Second Circuit
No. 35833

COUNTY ASPHALT, INC.,
Plaintiff-Appellant,

vs.

THE LEWIS WELDING & ENGINEERING CORPORATION,
Defendant-Appellee.

(June 11, 1971)

Before:
HAYS and FEINBERG, Circuit Judges, and
BLUMENFELD, District Judge*

BLUMENFELD, District Judge:

This is a diversity action claiming damages for negligence, breach of contract and breach of warranties aris-

* Of the District of Connecticut, sitting by designation.

ing out of the defendant's performance of agreements to furnish and erect two asphalt plants for the plaintiff. The defendant answered with a general denial and counterclaimed for the unpaid balance of the contract price, damages for conversion of the plants, and for the rental value of an old plant which the plaintiff had traded in as partial consideration for the new ones. After a trial to a jury, it returned a general verdict for the defendant on its first counterclaim accompanied by answers to special interrogatories. The trial judge entered judgment on the verdict and later amended it to include prejudgment interest. We find no error and affirm the judgment.

I.

To consider what the plaintiff urges as error committed by the District Court in interpreting the jury's answers to the interrogatories, it is necessary to set out a brief overview of the facts.

In December of 1964, the plaintiff, which had several asphalt plants, decided to replace two of them, one at Tarrytown and another at West Nyack, New York, with new equipment so as to be able to comply with newly adopted New York State specifications for base and finish materials used for road building.[1] After direct negotiations between the parties, it was agreed that the defendant would furnish and erect two asphalt plants at West Nyack and Tarrytown for $460,000 in cash and the two old plants which the defendant accepted as trade-ins. A separate written contract for the purchase of each plant was executed, each containing identical terms insofar as the issues raised here are concerned.

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[1] In general, these consisted of crushed stone of varying sizes with a binder of asphalt.

Appendix A

At the outset, the defendant was faced with the problem of obtaining unionized workers at West Nyack and Tarrytown. To meet that difficulty, the parties entered into an oral supplemental agreement under which the plaintiff would act as the nominal employer of such workers as the defendant requested and back-charge the defendant for the expenditures for labor and materials which it incurred on its behalf. The principal factual issues at trial were whether the defendant had substantially performed its contracts and whether it was guilty of breaches of warranties, with respect to the quality and performance capabilities of the plant equipment. Not in dispute was the fact that the plaintiff owed a balance of $385,229.25 on the purchase price before set-off of the back-charges for labor and materials.

The defendant counterclaimed for this unpaid balance of the purchase price and for the rental value of one plant which the plaintiff had continued to use after it had transferred it to the defendant as part of the purchase price. In addition, the defendant sought damages for the plaintiff's conversion of the two new plants brought about by its making and filing a financing agreement pledging the two plants as security for loans from a New York bank in the amount of $600,000 in violation of the contract provision that title was to remain in the defendant until final payment was made.

At the close of a nineteen day trial, the court charged the jury clearly and succinctly on all of the issues in the case. The plaintiff does not assert error in the charge. Its contention that it was error to deny it a jury trial on the question of consequential damages will be considered later.

Appendix A

II.

At the completion of his charge, the judge submitted to the jury appropriate forms for a general verdict with special interrogatories and directed them to answer the interrogatories and render a general verdict. The jury returned a general verdict for the plaintiff in the amount of $226,000. Contending that there was an irreconcilable conflict between the jury's answers to the special interrogatories and the general verdict, the plaintiff moved to reduce the judgment to $66,000 or for a new trial. Judge Croake concluded that the general verdict and the replies to the special interrogatories were entirely consistent and harmonious. We agree. The denial of the plaintiff's motion to amend the judgment or for a new trial was correct.

The plaintiff's principal contention on this appeal is that the jury's answers to the interrogatories mandated a reduction of the general verdict for the defendant to the amount of $66,000. The form submitted to the jury, and as answered by them, is shown to the extent that is relevant here:

> "PLEASE READ ALL QUESTIONS BEFORE PROCEEDING TO ANSWER ANY OF THEM.
>
> "GENERAL VERDICTS WITH SPECIAL INTERROGATORIES
>
> "I—*Questions in the nature of a general verdict.*
>
> "1. Is the plaintiff (County Asphalt) indebted to the defendant (Lewis Welding) for any amount not offset by the total of backcharges and damages, if any, found by you in your answers to the special interrogatories below?
>
> "Answer (yes or no) Yes

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"1a. If your answer to Question No. 1 is 'yes,' state the amount in dollars. $226,000

"2. If the answer to Question No. 1 is 'No,' is the defendant (Lewis Welding) indebted to the plaintiff (County Asphalt) for any amount the latter expended over and above the unpaid balance of the purchase price?

"Answer (yes or no)

"2a. If your answer to No. 2 is 'yes,' state the amount in dollars. $

"II—*Special Interrogatories.*

"1. Was there substantial performance on the part of defendant (Lewis Welding) of the contracts entered into with plaintiff (County Asphalt) on December 22, 1964?

"Answer (yes or no) Yes

"2. Is there a balance due defendant (Lewis Welding) from the total purchase price of the plants sold and erected at Tarrytown and West Nyack?

"Answer (yes or no) Yes

"2a. If your answer to Question No. 2 is 'No,' proceed to Question No. 3. If 'Yes,' what is the amount of the balance due the defendant?

"Answer (a dollar amount) $226,000

"3. Was there a supplemental agreement entered into by the parties wherein the plaintiff

Appendix A

(County Asphalt) agreed to supply labor, materials, and equipment as needed by the defendant (Lewis Welding) in the erection of the plants, and to pay for said labor, material and equipment, with the defendant agreeing to repay the plaintiff on being 'backcharged' by it?

"Answer (yes or no) Yes

"3a. If your answer to Question No. 3 is 'No,' disregard this question and proceed to Question No. 4. If your answer is 'Yes,' what was the reasonable amount that the plaintiff (County Asphalt) should have backcharged the defendant (Lewis Welding) for moneys expended by it in payment for employees, materials, or equipment?

"Answer (a dollar amount) $160,000

"4. The contracts in suit state:

"* * * The Company will repair or, at its option, replace any part or parts of the equipment which upon examination are determined to be defective or non-conforming under the Company's Warranty and in respect of which the Company was notified in writing, as hereinabove provided, within the warranty period. Such part or parts should, upon notification from the Company, be shipped to the Company, f.o.b. the Company's plant, for its examination.'

"Did the plaintiff (County Asphalt) comply with these provisions by:

Appendix A

"i. Giving notice to defendant (Lewis Welding)?

"Answer (yes or no) Yes

"ii. Shipping as requested?

"Answer (Yes or no) Yes

"iii. Allowing the defendant (Lewis Welding) reasonable access to the plants for purposes of repair or replacement?

"Answer (yes or no) Yes

"4a. Did the defendant (Lewis Welding) comply with these provisions by repairing or replacing every defective or non-conforming part of which it was made aware and given opportunity.

"Answer (yes or no) No

"5. Was the performance by the defendant (Lewis Welding) negligent, as that term has been defined to you in the discharge of its contractual duties?

"Answer (yes or no) No"

The function of the court in deciding whether an answer is "inconsistent with the general verdict" under Rule 49(b),[2] which is applicable here, was recently stated by us:

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[2] Rule 49(b): "General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories

(*Footnote continued on following page*)

> ". . . we must strugggle to avoid the finding of inconsistency and 'attempt to reconcile . . . by exegesis if necessary,' the specific reponses and the jury's overall judgment as to who should win and who should lose." (cases omitted). *Julien J. Studley, Inc.* v. *Gulf Oil Corp.*, 407 F.2d 521, 526-27 (2d Cir. 1969).[3]

The plaintiff's theory that the answers to special interrogatories mandate a judgment of but $66,000 is not easy to follow. Although the jury found in answer 2a that a balance of $226,000 was due the defendant, the plaintiff argues that the $160,000 in back-charges found in answer to interrogatory 3a must then be deducted from the $226,-

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(*Footnote continued from preceding page*)

upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial."

[3] In *Studley*, the court was divided not as to this standard but only as to the result reached by its application.

000 to leave a remainder of $66,000. But this would amount to a double deduction. The answer to 3a is logically a footnote explanation of the answer to 2a finding the balance due on the purchase price to be $226,000. Since it was not disputed that the unpaid balance of the contract price was $385,229.25, the set-off of $160,000 in back-charges, using round numbers,[4] left a remainder of $226,000. Furthermore, that the jury did not intend a different result is fully confirmed by its answer of "$226,000" to the first general verdict question:

> "Is the plaintiff (County Asphalt) indebted to the defendant (Lewis Welding) for any amount *not offset by the total of backcharges and damages, if any, found by you in your answers to the special interrogatories below?*" (Emphasis added).

The plaintiff advances a boot-strap argument that because of the jury's negative answer to interrogatory 4a, as to whether the defendant replaced "*every* defective or non-conforming part of which it was made aware and given the opportunity" (emphasis added), it must have intended to award damages for the defendant's failure to comply with its warranty.[5] And so, the argument con-

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[4] The plaintiff's brief points out that its actual out-of-pocket expenses claimed as back-charges amounted to $160,731.41.

[5] The plaintiff asserted many damage claims under this provision. The record reveals a maze of interconnecting choices of replacement and repair costs, presenting a challenge that the jury after six hours of deliberation may well have decided was insoluble. More importantly, the plaintiff admitted that it had included in the back-charges for which it took credit expenditures for the repair work it claimed had to be done.

tinues, the jury found that such damages amounted to $160,000, as evidenced by its answer to interrogatory 2a, and that that amount must be applied in reduction of the verdict to the defendant. Thus, the plaintiff insists that we go beyond an analysis of the special findings in relation to the verdict, and examine all of the evidence to find support for its theory that the jury must have intended to award substantial damages for the warranty breaches. In *Julien J. Studley, Inc. v. Gulf Oil Corp., supra,* 407 F.2d at 526, we did search the trial transcript for the limited purpose of determining whether there was any evidence at all on which the jury could have rested a special finding it made in support of its verdict. But it is misleading to argue from that case that we may affirmatively fashion special asymmetrical findings on our own from the evidence in order to undermine a jury's general verdict. Our function does not go so far as to search out how or why the jury reached their special findings; but only to whether those they did make are consistent with their verdict. There is nothing inconsistent in answering interrogatory 4a in the negative while refusing to award any money damages.[6]

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[6] Indeed, the answers to interrogatory 7 indicate that although a jury may find a wrong to have been committed by one party, an award of damages is not a foregone conclusion.

> "7. Did plaintiff (County Asphalt) 'convert' the plants, as the term 'convert' or 'conversion' has been defined to you?
>
> "Answer (yes or no) Yes
>
> "7a. If your answer to Question No. 7 was 'yes,' what damages, if any, were caused defendant (Lewis Welding) by plaintiff (County Asphalt's) conversion which were not listed in your answers to any of the above questions?
>
> "Answer (yes or no) No"

Appendix A

We cannot assume an answer the jury might have given had it been specifically asked what amount in damages the plaintiff sustained because of any breach of warranty. No such interrogatory was submitted.[7] The jury's failure to find that the plaintiff sustained its burden of proof of its damages cannot be used to cancel out $160,000 of a $226,000 obligation.

In strictness, there are no answers to interrogatories which are inconsistent either with the verdict or with each other so as to justify an amendment of the jury's verdict. Nevertheless, we have taken the step urged upon us by the plaintiff and have studied the record wherein the plaintiff assured us we would find undisputed and uncontradicted evidence establishing its damages for the defendant's warranty breaches amounting to approximately $160,000. To arrive at that figure, the plaintiff relies in large part on the testimony of its expert witness that it would cost approximately $141,000 to make the plants conform to the contracts.[8] Some indication that the jury affirmatively thought otherwise is provided by its answer

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[7] If the failure to submit an interrogatory asking the jury to set forth what amount, if any, it found as damages in the event of a negative answer to 4a merits any serious criticism, the plaintiff must share the responsibility. It appears that the general verdicts and special interrogatories were submitted on the initiative of the judge, but it is also on the record that he submitted them to counsel sufficiently far in advance to permit a full opportunity for thorough analysis. Indeed, there was some discussion and negotiation about them and a few suggested changes were made before their submission to the jury.

[8] The weakness of the argument is also indicated by plaintiff's own motion in the alternative for a directed verdict in favor of

(Footnote continued on following page)

to the first interrogatory that there was substantial performance of the contracts by the defendant. Beyond that, plaintiff's counsel ignores rules applicable to fact-finders which have long been predominate. When it comes to finding facts from the evidence, juries enjoy a near-total independence. Neither a court, *The Conqueror,* 166 U.S. 110, 131-33 (1897), nor a jury, *Head* v. *Hargrave,* 105 U.S. 45, 49 (1881), is bound to accept an expert witness' opinion, either as to whether the contract specifications were fulfilled or as to the amount of damages, regardless of whether he is in any way contradicted or impeached.

As stated in *Purcell* v. *Waterman Steamship Corp.,* 221 F.2d 953, 954 (2d Cir. 1955):

> ". . . there is no rule that the testimony of witnesses must be accepted if they are not contradicted and if their credibility is not impeached. It is true that expressions may be found in the books that there is such a rule, but there are a number of decisions in federal courts to the contrary. Indeed, this groundless notion must rest upon the assumption that the only evidence that

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(*Footnote continued from preceding page*)

the defendant for only $18,229.25 because of the "undisputed, uncontradicted and unimpeached" evidence of damages of $207,000 sustained by the plaintiff due to Lewis' breaches of warranties. The figure of $207,000 combines a claim for $66,000 to replace two dryers plus the $141,000 claimed by the plaintiff's expert witness for other repairs. Thus, the figure of $160,000 for damages does not appear on the record in such a way as to compel the plaintiff's interpretation of interrogatory 2a. Furthermore, our examination discloses evidence and testimony which supports the trial judge's denial of the directed verdict.

should count in a decision of fact is the spoken words of witnesses, so long as these are not in too great conflict with established physical facts. In short, the whole nexus of sight and sound that is lost in a written record is to count for nothing. Such mutilations of the processes of human inference can emanate only from those who suppose that 'legal reasoning' is a mental process unique and unrelated to ordinary affairs. The words that a witness utters, although they must of course be the vehicle of whatever he has to contribute, are again and again of no probative weight at all because of his address, his bearing and his apparent lack of intelligence. We have so often repeated the substance of this that it is obviously impossible to convince the bar that we mean to live up to it." (footnotes omitted).

There was no error in law in the jury's failure to find damages for any possible breach of warranties. Consequently, Judge Croake correctly decided that there was nothing inconsistent between the jury's responses to special interrogatories and their general verdict.

III.

On the basis of a provision in the contract agreements that the defendant "shall in no event have any liability for loss of profits, losses caused by shut-downs or delays or other similar or dissimilar consequential damages," its counsel moved in advance of trial that all claims of County Asphalt for consequential damages be dismissed and asked the court to make a preliminary determination of the issue. The judge denied the application for a

preliminary determination but reserved decision on the motion. After a large part of County Asphalt's case had been presented, including the negotiations leading up to the execution of the contracts, the court, in the absence of the jury, ruled that the claims for consequential damages should be dismissed. We agree.

Plaintiff's contention that it was entitled to a jury determination of the issue of unconscionability is completely without merit. Section 2-719(3) of the UCC specifically provides that:

> "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

Whether such a limitation of damages is unconscionable in a particular contract is expressly made a question of law for determination by the court. This is provided for by Section 2-302 of the UCC:

> "(1) If the *court as a matter of law finds* the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> "(2) When it is claimed or appears *to the court* that the contract or any clause thereof may be unconscionable the parties shall be afforded a reason-

able opportunity to present evidence as to its commercial setting, purpose and effect *to aid the court in making the determination.*" (Emphasis added).

The official comments of the draftsmen of this section read in pertinent part as follows:

> "The present section is addressed to the court, and the decision is to be made by it. The commercial evidence referred to in subsection (2) is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general triers of the facts." (UCC § 2-302, Comment 3).

It is the intent of the Code to give the court the power "to police explicitly against the contracts or clauses which they find to be unconscionable." UCC § 2-302, Comment 1. *And see Forstifresh Corp. v. Reynoso,* 52 Misc.2d 26, 274 N.Y.S.2d 757 (Dist. Ct. Nassau Cty. 1966), *rev'd on other grounds,* 54 Misc.2d 119, 281 N.Y.S.2d 964 (1967). Although a hearing at which the parties "shall be afforded a reasonable opportunity to present evidence," § 2-302(2), may be held at any time after the pleadings disclose the possibility that the limitation of damages may be unconscionable, it has been suggested "that the hearing should not be postponed until the time of trial, and if the objection of unconscionability is raised at the time of trial the evidence thereon should not be heard by the jury, because of the possibility that it might tend to confuse or prejudice the jury. In any event, the fact that a hearing is held does not, regardless of when it is held, alter the status of the question of conscionability as one of law

rather than one of fact." Anderson, Uniform Commercial Code, Vol. 1 at 407 (2d ed. 1970).[9]

Plaintiff's argument that its right to a jury trial on the issue of unconscionability is guaranteed by the seventh amendment of the Constitution hardly merits consideration. In 1791, when the amendment was adopted, the discretionary power to grant equitable relief according to the "conscience of the chancellor was so unmistakably a matter for the equity side rather than the law side of the court no further discussion of the constitutional ground is warranted. *Cf. Ross* v. *Bernhard,* 396 U.S. 531, 533 (1970).

We have examined plaintiff's other contentions and find them to be without merit, including the contention that the court below exceeded the bounds of discretion in awarding prejudgment interest on the net unpaid balance of the contract price from the time it was due until the date judgment was entered.

Judgment affirmed.

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[9] Defendant's counsel unsuccessfully sought resolution of the issue of unconscionability by a motion for summary judgment. In advance of trial, he served a motion requesting that the point be determined. Again, on the day the trial was to commence, he requested the court to conduct a hearing and make a determination before impanelling a jury, pointing out the possibility of prejudice which might ensue from the plaintiff's opening statement. Upon assurance from the plaintiff's counsel that "I don't plan to put myself in the position where I will say something to the jury that will not be in at the end of the case," and that his witnesses on lost profits would be his last two, the court again deferred ruling. After the evidence at trial showed that the contracts were the product of hard bargaining between experienced businessmen, with relatively equal bargaining power, and an awareness of the damage limitation provision, the court ruled that the plaintiff was not entitled to prove or recover consequential damages.

Appendix A

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 35833

COUNTY ASPHALT, INC.,

Plaintiff-Appellant,

v.

THE LEWIS WELDING & ENGINEERING CORPORATION,

Defendant-Appellee.

(July 7, 1971.)

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ PAUL R. HAYS

/s/ WILFRED FEINBERG
U.S.C.J.J.

/s/ M. JOSEPH BLUMENFELD
U.S.D.J.

Appendix A

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 35833

COUNTY ASPHALT, INC.,

Plaintiff-Appellant,

v.

THE LEWIS WELDING & ENGINEERING CORPORATION,

Defendant-Appellee.

(July 7, 1971.)

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY

Chief Judge

Appendix A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 66-Civ. 141.

COUNTY ASPHALT, INC., Plaintiff,

v.

The LEWIS WELDING & ENGINEERING CORPORATION, Defendant.

(Nov. 30, 1970.)

MEMORANDUM

CROAKE, District Judge.

This is a diversity action, having been removed to this court by defendant, from the New York State Supreme Court, Westchester County. The case concerns among other issues, "transactions in goods" within the scope of the Uniform Comercial Code's article on sales,[1] which were purchased by plaintiff, a New York corporation, from defendant, an Ohio corporation.

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[1] N.Y.U.C.C. 2-102 (McKinney's 1964); Ohio Rev.Code 1302.02. The "UCC" was adopted in New York in 1962, effective September 27, 1964 (N.Y.U.C.C. 10-105; in Ohio, in 1961, effective July 1, 1962 (Ohio 129 v. Senate Bill 5, eff. 7-1-62, §§ 2, 3).

Appendix A

On December 22, 1964, and January 19, 1965, the parties to this action executed in New York, four contracts[2] for the purchase and installation of asphalt plants at two locations, and automatic batch control systems for two other asphalt plants, all in New York State. The four contracts, prepared by the seller, defendant herein, all contained a standardized page entitled "General Terms and Conditions," which purported to limit defendant's warranties and plaintiff's remedies for breaches of warranty or contract. Plaintiff's payments were to be made periodically, according to the progress of defendant's performance, and title was to remain in defendant until the price had been paid in full.

Plaintiff made partial payment, and then instituted suit on December 24, 1965, seeking damages for breach of contract, breach of warranty, and negligence, and also specific performance of the contracts. Plaintiff also sought its disbursements under an asserted oral contract in providing labor, equipment, and material to assist defendant in defendant's erection of the plants.

Defendant counterclaimed for the amount due under the contracts, which the parties have stipulated to be $385,229.25, plus interest. Defendant also claimed that the making and filing of a financing agreement pledging the plants and certain other equipment to the Irving Trust Company as security for loans aggregating $600,000 plus interest, amounted to a conversion. Defendant claimed an alternative right to the $385,229.25 as damages under this theory, plus $700,000 punitive damages. Defendant also claimed that the replacement of certain parts of the

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[2] Each contract contains the erroneous factual assertion, "This contract was made in Solon, Ohio."

plants by plaintiff worked a *pro tanto* conversion. Other counterclaims sought the rental value for plaintiff's use of an old plant that was to have been traded in as part of the purchase price of the new plants, under a theory of quasi-contract, and an accounting by plaintiff of profits from its use of the two plants.

The case was tried to a jury and the undersigned for nineteen days. At trial, it was ruled that the plaintiff could not prove alleged lost profits.[3] The action for specific performance of the contract was abandoned. Defendant was granted a directed verdict, with plaintiff's acquiescence, as to the automatic batch control contracts (a minor part of the entire case). Otherwise, all issues survived for jury consideration.

The issues were presented to the jury in the form of a general verdict with written interrogatories, pursuant to Rule 49(b), F.R.Civ.P.[4] The proposed interrogatories were submitted to counsel for their comments well in advance of their summations. Each side proposed minor changes and additions, which were made. The jury was then charged on the several issues.

The jury found that the defendant had substantially performed the contracts, and that the plaintiff owed a net amount of $226,000, after deduction of $160,000 for expenses of plaintiff, from the approximately $386,000 unpaid balance owing defendant.

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[3] The ruling, during trial, on this issue is appended to this memorandum. Appendix B.

[4] See trial transcript, at 2627-2629, 2820, 2998, colloquy at 3020 et seq. The interrogatories, with answers by the jury, are attached to this memorandum as Appendix A.

Appendix A

The jury also found that the defendant had failed to provide the remedy of repair and replacement of defective or nonconforming parts, which the contracts stated was to be the exclusive remedy. This finding obviated the necessity for consideration of any "failure of essential purpose" under the Uniform Commercial Code, Section 2-719(2).[5]

The jury further found that neither party had been negligent. It found that there had been a conversion; it also found, however, that no damages flowed therefrom. And it found that the plaintiff was not liable for any rent.

Both parties have moved to amend the judgment which was entered for the defendant, The Lewis Welding and Engineering Corporation, in the amount of $226,000. Plaintiff has so moved because of a different interpretation of the jury's findings. The above discussion makes evident the undersigned's conclusion that the general verdict and the replies to the written interrogatories are entirely consistent and harmonious. Any other interpretation of the replies to the interrogatories would render them inconsistent both with the general verdict and with each other.

Defendant has moved to have the judgment amended to include an award of pre-judgment interest in its favor. Pre-judgment interest is a part of the entire recovery; along with such limitations of remedy as exclusion of consequential damages, it is one aspect of the general issue of the measure of recovery for breaches of contract. St. Clair v. Eastern Air Lines, Inc., 302 F.2d 477 (2d Cir.

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[5] Ohio Rev.Code 1302.93(B). See Appendix B.

1962); Restatement (second) Conflict of Laws (Proposed Official Draft, 1968) § 207, Comment e; *but cf.* Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961).

Defendant has asserted that New York law governs the interest issue, while plaintiff argues for Ohio law. The appropriate standard for determination of a choice of law issue in a diversity case is the conflicts of law rules of the forum state (New York). The revelant rule, contained within the New York U.C.C., provides:

> "§ 1-105 *Territorial Application of the Act; Parties' Power to Choose Applicable Law.*
>
> "(1) * * * When a *transaction* bears a *reasonable relation* to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an *appropriate* relation to this state [emphasis supplied]."[6]

The parties to this suit in each of their contracts here in issue agreed as follows:

> "GOVERNING LAW: The validity, interpretation, and performance of this contract shall be governed by the laws of Ohio."[7]

Therefore, if it be assumed that New York is "appropriately related" to the transactions herein involved, the

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[6] N.Y.U.C.C. 1-105(1).

[7] Page in all the contracts entitled, "General Terms and Conditions."

question becomes whether Ohio is "reasonably related" to the "transaction." The answer is that it is; while most of the performance of the contracts was to occur in New York, significant events were to occur in Ohio. Certain parts for the equipment sold by defendant were to have been fabricated or shipped from defendant's plant located in Ohio. And the contracts provided plaintiff an exclusive remedy of repair or replacement of parts "* * * shipped to the Company * * *"[8]

It appears quite reasonable for the defendant to have required that its performance be regulated by the legal system with which it was presumably most familiar in light of the probability of a substantial part of its performance's occurring in Ohio. Therefore, Ohio law will be applied to all issues concerning remedies for contractual breaches.[9]

Ohio law provides no explicit statutory guidelines[10] comparable to New York's C.P.L.R. 5001[11] for determining situations in which pre-judgment interest should be awarded. The decision appears to be left to the court's discretion, guided only by general equitable principles. Young v. Potts, 161 F. 2d 597, 600 (6th Cir. 1947); Crown Industries, Inc. v. Boyertown Burial Casket Company, 300 F. 2d 809, 810, dissent at 812 (6th Cir. 1962); *cf.*

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[8] Ibid.

[9] See also last paragraph of Appendix B.

[10] See Ohio Rev.Code chapter 1343.

[11] McKinney's, 1963.

Miller v. Robertson, 266 U. S. 243, 257-258, 45 S. Ct. 73, 69 L. Ed. 265.[12]

There are factors in this case militating both for and against an award of interest. In its favor, there is a policy of comercial situations that "remedies * * * all be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed."[13] Commercial contexts would normally require inclusion of interest on a payment adjudged unjustifiably withheld.[14]

The major factor supporting plaintiff's opposition to the imposition of interest is the uncertainty of the debt. That the unpaid purchase price was owing was never questioned, but the merit of plaintiff's asserted offsets[15] was incalculable until trial. One offset, a claim for expenses incurred in the performance by plaintiff of an oral contract, was eventually allowed in the amount of $160,000. Another offset, for consequential damages in the na-

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[12] Federal Surety Co. v. A. Bentley & Sons Co., 51 F.2d 24 (6th Cir. 1931), cited by both parties herein, is best understood as a case applying the "federal rule" in a pre-Erie R. R. v. Tompkins context.

[13] U.C.C. 1-106; Ohio Rev.Code 1301.06.

[14] Royal Indemnity Co. v. United States, 313 U.S. 289, 296, 61 S.Ct. 995, 85 L.Ed. 1361 (1941). The facts of this case involved default upon a contractual obligation owed the United States.

[15] U.C.C. 2-714; Ohio Rev.Code 1302.88.

ture of lost profits, survived defendant's attempt at pre-trial dispositon, to be disallowed at trial.[16]

On balance, with regard to the contract for the sale of the asphalt plants, with regard to the nature of this case and to the jury's findings, this court determines that an allowance of interest is necessary in order for the defendant to receive adequate compensation for its injury. Testimony at trial indicated that the plaintiff has been receiving interest on what has now been determined to have been defendant's money since 1965. Accordingly, interest at the rate of 6 percent will be assessed on the $194,229.43 portion of the $226,000.00 recovery allocable to the asphalt plant contracts.[17] Since the unpaid balance on the Tarrytown plant was due on July 1, 1965, and on the West Nyack plant on September 16, 1965,[18] interest will run from the intermediate date of August 8, 1965, through November 9, 1970, the date judgment was entered.

With regard to the two automatic batch control system contracts, no evidence was adduced to counter the contention that the entire price became payable upon New York State approval of the systems, and so an unopposed directed verdict was granted on this issue. Therefore, interest at 6 percent will be assessed, on the $14,403.76

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[16] Defendant's motion for summary judgment on the issue of consequential damages was denied by Judge Frankel of this court on June 2, 1968. *See also* Appendix B.

[17] This is the maximum Ohio rate; Ohio Rev.Code 1343.03.

[18] See the payment terms of the contracts; page 18 in those signed December 22, 1964. These pages set payment dates and amounts. *See also* Pre-Trial Order; trial testimony.

due on the Hancock, New York system, to run from September 1, 1965, and on the $17,366.81 due on the Walton, New York system, to run from November 1, 1965, both through November 9, 1970.

In conclusion, the judgment entered upon the general verdict will be amended to include an additional amount of interest at the rate of 6 percent and from the dates indicated above. All motions on which decisions were reserved at trial, by judgment *non obstante veredicto,* and for a new trial, as heretofore indicated, are denied.

So ordered.

APPENDIX A

PLEASE READ ALL QUESTIONS BEFORE PROCEEDING TO ANSWER ANY OF THEM

GENERAL VERDICTS WITH SPECIAL INTERROGATORIES

I—*Questions in the nature of a general verdict.*

1.	Is the plaintiff (County Asphalt) indebted to the defendant (Lewis Welding) for any amount not offset by the total of backcharges and damages, if any, found by you in your answers to the special interrogatories below?	
	Answer (yes or no)	Yes
1a.	If your answer to Question No. 1, is "yes," state the amount in dollars.	$226,000
2.	If the answer to Question No. 1 is "No," is the defendant (Lewis Welding) in-	

debted to the plaintiff (County Asphalt) for any amount the latter expended over and above the unpaid balance of the purchase price?

Answer (yes or no) ——

2a. If your answer to No. 2 is "yes", state the amount in dollars. $——

II—*Special Interrogatories.*

1. Was there substantial performance on the part of defendant (Lewis Welding) of the contracts entered into with plaintiff (County Asphalt) on December 22, 1964?

Answer (yes or no) Yes.

2. Is there a balance due defendant (Lewis Welding) from the total purchase price of the plants sold and erected at Tarrytown and West Nyack?

Answer (yes or no) Yes

2a. If your answer to question No. 2 is "No," proceed to Question No. 3. If "Yes," what is the amount of the balance due the defendant?

Answer (a dollar amount) $226,000

3. Was there a supplemental agreement entered into by the parties wherein the plaintiff (County Asphalt) agreed to sup-

ply labor, material, and equipment as needed by the defendant (Lewis Welding) in the erection of the plants, and to pay for said labor, material, and equipment, with the defendant agreeing to repay the plaintiff on being "backcharged" by it?

Answer (yes or no) — Yes

3a. If your answer to Question No. 3 is "No," disregard this question and proceed to Question No. 4. If your answer is "Yes," what was the reasonable amount that the plaintiff (County Asphalt) should have backcharged the defendant (Lews Welding) for moneys expended by it in payment for employee materials, or equipment?

Answer (a dollar amount) — $160,000

4. The contracts in suit state:

"* * * The Company will repair or, at its option, replace any part or parts of the equipment which upon examination are determined to be defective or nonconforming under the Company's Warranty and in respect of which the Company was notified in writing, as hereinabove provided, within the warranty period. Such part or parts should, upon notification from the Company, be shipped to the Company, f. o. b. the Company's plant, for its examination."

Appendix A

Did the plaintiff (County Asphalt) comply with these provisions by:

i. Giving notice to defendant (Lewis Welding)?

Answer (yes or no) Yes

ii. Shipping as requested?

Answer (yes or no) Yes

iii. Allowing the defendant (Lewis Welding) reasonable access to the plants for purposes of repair or replacement?

Answer (yes or no) Yes

4a. Did the defendant (Lewis Welding) comply with these provisions by repairing or replacing every defective or non-conforming part of which it was made aware and given opportunity?

Answer (yes or no) No

5. Was the performance by the defendant (Lewis Welding) negligent, as that term has been defined to you in the discharge of its contractual duties?

Answer (yes or no) No

5a. If your answer is "No," proceed to Question No. 6. If "Yes," what is the total diminution in value by reason of defend-

ant's (Lewis Welding) negligence in the discharge of its contractual duties which is not included in the amounts, if any, stated in your earlier answers?

Answer (a dollar amount) ——

6. Did the plaintiff (County Asphalt) operate and maintain the plants and equipment which are the subjects of the contracts in suit in a proper manner?

Answer (yes or no) Yes

6a. If your answer is "yes," proceed to Question No. 7. If "no," what damages, if any, included in the amounts fixed by you in your earlier answers were caused by plaintiff (County Asphalt's) failure to properly operate or maintain?

Answer (a dollar amount) ——

6b. If your answer to Question No. 6 was "No," please look at your answer to Question No. 5. If your answer to that question was "Yes," then answer this question. Otherwise, proceed to Question No. 7. (Question) Were any of the damages listed in your answer to Question No. 5 proximately caused, as that term has been defined to you, by plaintiff's (County Asphalt) failure to operate or maintain the plants or equipment?

Answer (yes or no) ——

Appendix A

7. Did plaintiff (County Asphalt) "convert" the plants, as the term "convert" or "conversion" has been defined to you?

Answer (yes or no) Yes

7a. If your answer to Question No. 7 was "yes" what damages, if any, were caused defendant (Lewis Welding) by plaintiff (County Asphalt's) conversion which were not listed in your answers to any of the above questions?

Answer (yes or no) No

7b. If your answer to Question No. 7 was "yes," did plaintiff (County Asphalt) "convert" the plants in a manner that was willful, malicious and in wanton disregard of the rights of defendant (Lewis Welding)?

Answer (yes or no) No

7c. If your answer to Question No. 7b was "yes" and you believe that punitive damages, as that term has been defined to you, should be assessed against plaintiff (County Asphalt), in what amount should such damages be so assessed? If you do not award a dollar amount in answer to Question No. 7a, you must not award a dollar amount here.

Answer (a dollar amount) ——

Appendix A

8. Is the plaintiff (County Asphalt) liable for the reasonable rental value in the West Nyack, N. Y. area for five months in the summer of 1965 for a used 1949 Cummer 2-Ton Asphalt Plant?

Answer (yes or no) No

8a. If your answer to Question No. 8 was "yes," what is the reasonable rental value for which the plaintiff is liable?

Answer (a dollar amount) ——

APPENDIX B

Ruling on the Enforceability of Exclusions of Consequential Damages in Two of the Contracts in Suit

The contracts involved in this action purport to exclude consequential damages for seller's breaches. Plaintiff has asserted that these exclusions should be denied enforcement because of their "unconscionability."[1] It is the opinion of this Court that a determination of this issue can now be made without recourse to a separate hearing out of the presence of the jury. Such a hearing is not legally required and would at this time prove unnecessary, since all the facts into which it could inquire have already been developed during the extensive trial. Accordingly, the Court now rules that the clauses in question are not unconscionable, for the following reasons:

[1] U.C.C. 2-719, 2-302; Ohio Rev.Code 1302.93, 1302.15.

Appendix A

UCC 2-719[2] expressly permits exclusion of consequential damages unless such exclusion would be unconscionable. It states that "Limitation of damages where the loss is commercial is not [prima facie unconscionable.]" Typical cases where a contract or clauses thereof are "unconscionable" are where one party has been misled as to the nature of the bargain, where there appears to have been a severe imbalance in bargaining power, or where specific terms appear "outrageous."[3] While these situations occur more frequently in non-commercial settings, the existence of a commercial setting is not of itself sufficient insulation against a charge of unconscionability. However, it is the exceptional commercial setting where a claim of unconscionability will be allowed, absent undiscoverable "latent defects." And in this, as most commercial situations, there appear to have been no "incidents of unconscionability," such as have been described above. On the contrary, the evidence presented warrants the following conclusions:

Defendant has evinced enough good faith in the performance of its contractual obligations to allow it to assert the exculpatory clause. Were the defendant guilty of bad faith, it might have been estopped from asserting exculpatory contractual language. Courts and commentators have used such terms as "substantial performance" or performing the "iron essence" of a contract when discussing what minimum is necessary to allow a party

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[2] Ohio Rev. Code 1302.93.

[3] See generally, Ellinghaus, In Defense of Unconscionability, 78 Yale L.J. 757, 793 et seq., and cases therein cited.

to raise these defenses,[4] but the basic idea appears to be akin to "good faith." In this case, while the jury may or may not find that defendant has not performed to the letter of the contracts, the evidence does unquestionably demonstrate that defendant has "substantially performed" for the purposes of this ruling.

Furthermore, the existence of competitors in defendant's industry, and plaintiff's utilization of that fact by procuring alternative contract proposals from defendant's competitors, precludes any argument of unequal bargaining power. There has been no showing that the clauses in question are part of an adhesion form agreed upon by every member of defendant's industry, and even if there had been such a showing, plaintiff would have retained the impressive negotiation power of one prepared to spend approximately one-half million dollars. The continued inclusion of the clauses in the contracts here in issue, in spite of plaintiff's powerful bargaining position, is further support for the inference that they are necessary to the orderly functioning of defendant's industry. Plaintiff could always have negotiated for a "liquidated damages" clause.[5]

Also, plaintiff's experience and expertise, and the parties' care in negotiating these large contracts, preclude any argument of unfair surprise.

Finally, defendant has provided plaintiff with what will be an adequate substitute remedy. The contracts state:

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[4] See *e.g.*, *Llewellyn*, The Common Law Tradition (1960) 362-371, on the subject of what is the "essence" of a transaction of this type.

[5] See U.C.C. 2-718; Ohio Rev.Code 1302.92.

> * * * the remedy hereinafter provided the Purchaser shall be exclusive for any breach * * * The company will repair or, at its option, replace any part or parts of the equipment which upon examination are determined to be defective or non-conforming * * *

The Uniform Commercial Code states that this remedy of "repair and replacement" may be designated the buyer's exclusive remedy.[6] But in so designating any remedy as "exclusive," a seller runs the risk that the remedy will "fail of its essential purpose." In such a situation, the buyer will be relegated to all other remedies,[7] in order to preserve for him "at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract."[8]

Plaintiff has alleged various breaches by defendant of the contracts at issue. If any of these breaches are proven to have occurred, the circumstances of the parties then and now will render the exclusive remedy provided wholly inadequate. Therefore, if plaintiff is entitled to any remedy at all, it is entitled to whatever remedies would be available to it "if the * * * clause had never existed."[9] Indeed, to enforce the exclusivity of the "repair and replacement" remedy in the face of any of the breaches

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[6] U.C.C. 2-719(1) (a); Ohio Rev.Code 1302.73(A) (1).

[7] U.C.C. 2-719(2); Ohio Rev.Code 1302.93 (B).

[8] U.C.C. 2-719, Official Comment (1).

[9] *Ibid.*

herein asserted would be to create an unconscionable result.

Plaintiff would have UCC 2-719 read in such a fashion as to result in all limitations whatsoever being stricken in any event in which an exclusive remedy should fail of its essential purpose. A better reading is that the exclusive remedy clause should be ignored; other clauses limiting remedies in less drastic manners and on different theories would be left to stand or fall independently of the stricken clause. Since the clause excluding consequential damages has been held not unconscionable, and is not otherwise offensive, it will be applied. Therefore, plaintiff will still be allowed to obtain incidental damages, including "commercially reasonable charges, expenses, or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach," [10] but excluding consequential damages.

Since other exculpatory clauses in the contracts have not been challenged as unconscionable, their validity in that respect is not in dispute. But the above-stated reasoning would appear to be applicable in any such challenge.

This ruling shall not affect plaintiff's rights, if any, under the asserted backcharge agreement.

The Uniform Commercial Code as adopted and construed by the State of Ohio governs this issue. However, the result would have been identical had the Code as adopted and constructed by New York been found applicable.

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[10] U.C.C. 2-715; Ohio Rev.Code 1302.89.

Appendix A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 141

COUNTY ASPHALT, INC.,

Plaintiff,

—against—

LEWIS WELDING & ENGINEERING CORP.,

Defendant.

(November 9th, 1970)

JUDGMENT NO. 71,065

The issues in the above entitled action having been brought on regularly for trial before the Honorable Thomas F. Croake, United States District Judge, and a jury on October 5, 6, 7, 8, 9, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29 and 30, 1970, and the Court having submitted to the jury appropriate forms for a general verdict, together with written interrogatories upon the several issues of fact, and the jury having answered the written interrogatories as indicated thereon in favor of the defendant, and the Court having found there was no inconsistency between the written interrogatories and the general verdict, and the Court on November 5, 1970 having denied all motions and directing the Clerk to enter judgment in favor of the defendant, it is

Appendix A

ORDERED, ADJUDGED AND DECREED: That the defendant Lewis Welding & Engineering Corp., have judgment against the plaintiff County Asphalt, Inc., in the amount of $226,000.

Dated: New York, N. Y.

JOHN LIVINGSTON
Clerk

APPROVED:

THOMAS F. CROAKE
U.S.D.J.

Appendix A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 141

COUNTY ASPHALT, INC.,

Plaintiff,

—against—

THE LEWIS WELDING & ENGINEERING CORPORATION,

Defendant.

(October 22, 1968)

MEMORANDUM

FRANKEL, District Judge.

The papers on both sides are detailed and interesting. They have been studied with the attention they merit. In the end, however, finding that the motion must be denied and that ultimate conclusions on the difficult issues must await full development of the facts, the court deems it best to refrain from prematurely final expressions based upon insufficient data. Accordingly, what follows should be read only as a brief sketch of the reasons why summary judgment is not warranted, leaving even the premises of this intermediate conclusion open for reexamination later upon a full record and possibly later developments in the somewhat murky law that applies.

1. There is a threshold dispute as to the applicable law. When the case is ready for final disposition, later

decisions under the Uniform Commercial Code (UCC) may make this a significant issue. As things stand, identical statutory texts and an equal absence of judicial construction in both Ohio and New York make it immaterial, as the parties seem to agree, which law applies. For convenience, therefore, this court has referred to the pertinent section, 2-719, as it appears in the New York Code.

2. In the original papers, defendant appeared to press the view that plaintiff must be held to the "exclusive or limited remedy" specified in the contract. Plaintiff presented substantial grounds for concluding that genuine issues of fact would have to be resolved in order to determine whether this limitation could be enforced consistently with UCC §2-719(2). If there remained a dispute about this, the court would adopt plaintiff's view that such issues are, indeed, present. But defendant, following oral argument, appears to have accepted that premise though only for purposes of this motion. Accordingly, the motion could not be granted on the theory that the three causes of action under attack are barred by the contract provision for an exclusive remedy.

3. This is not, however, the end of the matter. Subsection (2) tells us only when a restriction to "*an* exclusive or limited remedy" may or may not be enforced. But the true question ultimately tendered by the motion is this: Assuming the single "exclusive" remedy is not to be plaintiff's sole recourse, and assuming various other remedies are allowed, is plaintiff nevertheless bound by its separate and additional contract stipulation that it would not in any event be entitled to recover "consequential damages"? And this question is in terms ruled by subsection (3), not subsection (2), of §2-719.

Turning to subsection (3), we find no adequate ground in it and the papers for the granting of defendant's motion. This subsection authorizes a contractual waiver of consequential damages

> "unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

Defendant, correctly, argues that this is not a case where the exclusion "is prima facie unconscionable * * *." But it does not follow at all that a full account of the facts may not disclose "unconscionability" in a pertinent sense. And such an account should probably include evidence touching the negotiations so that there may be the clearest possible understanding of what the parties intended by the limitation which appears now to have become critical. In fact, defendant seems, perhaps with a different objective in view, to support this conclusion by its own submissions. Through evidentiary matter outside the pleadings (a requested change in the duration of warranties) defendant seeks to generate an inference that plaintiff's people acted with detailed and deliberate awareness when they accepted the restriction now in issue. This may well be a cogent *factual* argument. But it does not exclude factual arguments supporting possibly different inferences. And it is precisely the existence of such genuine possibilities, documented by defendant itself, which preclude the granting of the partial judgment defendant seeks without a trial. Cf. *Granite Worsted Mills* v. *Aaronson Cowen, Ltd.*, 29 A. D. 2d 303, 287 N. Y. S. 2d 765, 769 (1st Dep't 1968).

4. What has been said here concerning the apparent meaning of, and potential factual problems under, subsection (3) is rested almost entirely upon a textual analysis of that provision. Judging by the parties' presentations and the court's explorations, which have not necessarily been independently exhaustive, there is little more to go on. No shining gloss appears from the law of Ohio, or New York, or, for that matter, any other jurisdiction. It is by no means clear how sharply the subsection meant to restrict responsible executives of large companies, dealing at arms' length, in efforts to escape from limitations for which they have contracted. But the very difficulty of the problem counsels against its handling with so "blunt a' weapon" as summary judgment. See *Miller* v. *General Outdoor Advertising Co.*, 337 F. 2d 944, 948 (2d Cir. 1964).

Our conclusion is reinforced, finally, when we note that many of the facts material under the first, second and fourth causes of action must be developed for the five causes to which the present motion is not directed and which, therefore, are presumably destined for trial in any event.

The motion is denied.

So ordered.

APPENDIX B—Statutory Provisions Involved

Statutory Provisions Involved

1. U. S. Const. amend. VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

2. Page's Ohio Rev. Code, § 1302.15 (U.C.C. § 2-302):

Unconscionable Contract or Clause.

(A) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(B) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

3. Page's Ohio Rev. Code § 1302.93 (U.C.C. § 2-719):

Contractual Modification or Limitation of Remedy.

Appendix B

(A) Subject to the provisions of divisions (B) and (C) of this section and of section 1302.92 of the Revised Code on liquidation and limitation of damages,

(1) the agreement may provide for remedies in addition to or in substitution for those provided in sections 1302.01 to 1302.98, inclusive, of the Revised Code, and may limit or alter the measure of damages recoverable under such sections as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(2) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(B) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in Chapters 1301., 1302., 1303., 1304., 1305., 1306., 1307., 1308., 1309. of the Revised Code.

(C) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

4. Fed. R. Civ. P. 49:

Special Verdicts and Interrogatories.

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special writ-

ten finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict,

judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.